SUPREME COURT
OF THE UNITED STATES.

OCTOBER TERM, A. D. 1911

NO. 160

ONTARIO LAND COMPANY,
APPELLANT

vs.

CHARLES H. WILFONG, ET AL,
APPELLEES

BRIEF FOR APPELLANT ON MOTION, TO DISMISS OR AFFIRM.

STATEMENT OF THE CASE.

This appeal is from a judgment and decree of the Circuit Court of Appeals for Ninth Circuit, reversing a decree of the Circuit Court for the Eastern District of Washington, in favor of the Appellant. The suit was brought for the purpose of cancelling and setting aside, as a cloud on appellant's title, certain tax deeds issued by the County Treasurer of Yakima County, to the Appellees, under which the latter claimed title in fee to the property described in the Bill of Complaint,

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adversely to the regularly derived title of Appellant.

The Bill of Complaint duly alleged diversity of citizenship, jurisdictional value, fee ownership of the lands in the Appellant, and set out in detail the several defects in the tax titles which were alleged to render said tax titles void, and also, expressly alleged that, because of the lack of description of the property, attempted to be sold for the taxes, to give the force and effect to the tax judgment and deeds contended for by appellees, would be to deprive the appellant of its property without due process of law, in violation of the 14th amendment of the Federal Constitution, and appellant by proper averment in the bill, expressly relied for protection as against defendants asserted claim of title, upon that clause of the 14th amendment, which provides that "No state shall deprive any person of his property without due process of law." (See Sec. 15 to 19 of Bill of Complaint, pp. 4-6 Record). It thus clearly appears that the Jurisdiction of the Circuit Court was invoked upon two distinct grounds:

1. Diversty of Citizenship. (See Bill pp. 1-2 Record).

2. That to hold the tax foreclosure judgment and deeds valid, would be to deprive the appellant of its property without due process of law, for the

various reasons assigned in the bill (pp. 4-6 Record).

In substance, these allegations of federal character, were, that in the tax proceedings our property was not in any way described, and that consequently we had no notice nor opportunity to be heard, which was contrary to "due process" guaranteed by the 14th Amendment. This bill was filed on January 10th, 1907, (p. 1. of Record), and long before the case of *Ontario Land Company vs. Yordy*, 212 U. S., 152, was decided. The Circuit Court decided the suit in favor of the appellant, holding the tax proceedings void upon several grounds, among others, because the property was nowhere described, or identified, and tax proceedings did not constitute due process (see pp. 127-130 Record). (162 Fed. Rep. 999). Thereupon appellees appealed to Circuit Court of Appeals, and after the case was there argued and submitted (Oct. 12th, 1908, p. 148 Record), but before the Court of Appeals rendered its decision, this Court had decided in the case of *Ontario Land Co. vs. Yordy*, 212 U. S., 152, that under the facts of the case, it could not hold that appellant was deprived of its property without due process of law. The Yordy case was decided in February, 1909, and thereafter, and on May, 1909, the Court of Appeals filed its decision in this case, reversing the decree of Circuit Court, with instructions to

dismiss the bill, upon the grounds that the decision of the Yordy case was decisive of the sufficiency of description of the property, and that other defects in the tax proceedings claimed to render them void were not sufficient to avoid the tax title (p. 149-154 Record).

Thereupon the appeal was duly taken from the Judgment of the Circuit Court of Appeals to this Court, which appellee now moves to dismiss for want of jurisdiction.

ARGUMENT OF MOTION TO DISMISS.

The right of appeal to this Court from the Court of Appeals in this case is governed solely by the Judiciary Act of March 3, 1891, Sec. 6, which reads as follows:

> "Sec. 6. That the Circuit Courts of Appeals established by this Act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the District Court and the existing Circuit Courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law, and the judgments or decrees of the circuit courts of appeal *shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different states;* also in all cases arising under the

patent laws, under the revenue laws, and under the criminal laws and in admiralty cases, excepting that in every such subject within its appellate jurisdiction the Circuit Court of Appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that Court for its proper decision. * * * * * * * * *

In all cases not hereinbefore, in this section, made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs. But no such appeal shall be taken or writ of error sued out unless within one year after the entry of the order, judgment or decree sought to be reviewed."

The motion to dismiss is based upon that clause of the statute, which we have italicized in the above quotation; the claim being that the jurisdiction of the Circuit Court was, within the meaning of that clause, "dependent entirely" upon the diverse citizenship of the parties. That until after the decision of this Court in the Yordy case (212 U. S., 152)) the question raised by our bill in this case, whether the Washington tax proceeding amounted to due process against complainant's land, was a question of real substance, and not trivial or absurd, must be deemed to have been settled by this Court, when it entertained and passed upon the merits of the Yordy case, after the

making an elaborate argument of the motion to dismiss, which as the record will show, was made in this Court in that case, upon the ground that no federal question was presented. Upon that subject no further argument seems called for. We understand the present contention of Appellee, to be not that the federal question raised by our bill of complaint was, when so raised, unreal, unsubstantial or without color of merit, but that, it became so when some twenty months afterwards, the Yordy case was decided by this Court. The motion proceeds upon the theory, that at our hearing the jurisdiction of the Circuit Court depended upon the conditions *then* existing, rather than upon those presented by the bill and actually existing when it was filed; that from the time when the federal question raised by our bill was by the Yordy decision, stripped of its color of merit, it ceased to be a factor in the Court's jurisdiction. But, in point of principle, the law is settled to the contrary.

Many attempts have been made to induce this Court to gauge the Circuit Court's jurisdiction by the conditions and issues existing at the time of the hearing, rather than by reference to the allegations of the bill or declaration, and the conditions existing when it was filed, but never with success.

Colorado Central Mining Co. vs. Turck, 150

U. S., 138; *Press Publishing Co. vs. Monroe,* 164 U. S., 105, 112; *American Sugar Refining Co. vs. New Orleans,* 181 U. S., 277; *Arkansas vs. Kansas & Texas Coal Co.* 183 U. S., 185; *Hugueley Co. vs. Galeton & Co.,* 184 U. S., 290, 294; *McFadden vs. U. S.,* 213 U. S. 288, 294.

In each of the above cases it was held that in the Act of Congress above quoted, the reference in the italicized clause is to the jurisdiction of the *Circuit* Court, and to that jurisdiction "as originally invoked." The attempt made in each case to use for jurisdictional purposes, federal questions legitimately introduced into the case by pleadings subsequent to the bill of declaration, was overruled, upon the principle that the grounds of jurisdiction are unalterably fixed by the bill. That it is by inspection of the bill, and by conditions existing at its filing, that the jurisdiction is determinable, is in the nature of a maxim.

Florida vs. Bell, 176 U. S., 321, 325.

The principle of the foregoing cases is the *essential stability of the jurisdictional status as determined by the bill or declaration and by the conditions subsisting at the commencement of the action.* And for the same reason that jurisdiction cannot, by subsequent developments, be reinforced, or supplied if originally wanting, it cannot, generally speaking, if once existing, be undermined by

the subsequent lapsing of the conditions that called it into being. Once effectively invoked, it ceases to be dependent upon the continuance of such conditions. The principle of stability works both ways: excluding the introduction of new grounds of jurisdiction and ignoring the cessation of old ones.

Hence it is, that federal jurisdiction, once vested on ground of diverse citizenship, is not divested by any change of domicile.

Morgan vs. Morgan, 2 Wheat, 290, 305.

Nor is it affected by the transfer, *pendente lite*, of Plaintiff's Claim to one not qualified in point of citizenship, to have brought the action.

Glover vs. Shepperd, 21 Fed. 482.

Nor by any *pendente lite* change of territorial jurisdictions.

Culver vs. Woodruff, 5 Dillon, 394.

Nor by the joinder in a creditor's bill, of new creditors of incompatible citizenship.

Stewart vs. Dunham, 115 U. S. 61.

Nor by the coming in to the defense of an action of ejectment, of a landlord of the same citizenship as the Plaintiff.

Hardenberg vs. Ray, 151 U. S., 112.

Nor by the succession to the defence, of an administration of the same citizenship with Plaintiff.

Hatfield vs. Bushnell, 1 Blatch, 395.

Nor by the naturalization *pendente lite* of an Indian indicted in a federal court, whose jurisdiction was based upon his membership of an Indian tribe.

Ex parte Kyle 67, ed. 309.

It was by an express application of the same principle, that in *Kanouse vs. Martin,* 15 How., 198-208, it was held that where the federal jurisdiction had once vested by the filing in a state court of removal papers, the Plaintiff could not even before the actual transfer of the case, undermine the jurisdiction by reducing his claim to less than the federal jurisdictional amount. It was there said by Curtis J., speaking for the Court:

> "Without any positive provision of any act of Congress to that effect, it has long been established that when the jurisdiction of a Court of the United States has once attached, no subsequent change in the condition of the parties could oust it."

The jurisdiction in the case at bar having been originally invoked upon two grounds, diverse citizenship, and a question federal in character, with color of merit, it is obvious that no reason whatever can be assigned, why the latter ground should not as well survive a *pendente lite* loss of color, as the former does a *pendente lite* loss of diversity.

It only remains to review the cases cited by appellee in support of the motion.

In *McGilvra vs. Ross*, 215 U. S., 70, the Court held that the federal question presented by the Bill in the Circuit Court was no longer open to discussion *at the time* its jurisdiction was invoked, and therefore the Circuit Court was wholly without jurisdiction to hear and determine the case. The same reasons for refusing to appeal were given in *Kauffman vs. Smith*, 216 U. S., 610, and *Bird vs. Ashton*.

In *Farrell vs. O'Brien*, 199 U. S., 89, the appeal was denied, for the obvious reason that the assertion of the federal question in the bill was wholly subordinate to the determination of the existence of an alleged Will and probate thereof, a question over which the Circuit Court had no jurisdiction. In other words, it was clearly a case where the assertion of federal question was a mere claim of words, "devoid of all reasonable foundation."

It is thus made clear, by the cases cited in support of the motion that the reason for denying appeal in each case was because the "Jurisdiction of the Circuit Court, *as originally invoked*, was not in fact invoked on federal grounds, nor upon any grounds, which by Sec. 6 would authorize an appeal from the Court of Appeals to this Court." This is not such a case. Counsel's argument, if we understand him correctly, seems to be, that since by the Yordy decision, the federal question in this

case has been deprived of merit, there is nothing for this Court to review, and the appeal should be dismissed. But if our appeal is well taken, it is well settled that the jurisdiction of this Court is not limited to the constitutional question, but includes the whole case.

Penn. Mutual Life vs. Austin, 168 U. S. 685.

Whitten vs. Tomlinson, 160 U. S. 231.

Loeb vs. Columbia, 179 U. S., 472-481.

Union Pac. vs. Harris, 158 U. S. 327.

II.

ARGUMENT ON MOTION TO AFFIRM.

The alternative motion to affirm is based upon the propositions made by Counsel:

(A.) That the jurisdiction of this Court to review is dependent upon the federal question, which has been eliminated from controversy by the Yordy decision, and that therefore there is nothing left for review.

(B.) That if the whole case is reviewable, all other questions are foreclosed by the decisions of the State Court and the Court of Appeals and are so devoid of merit as to justify affirmance, without argument.

The first proposition does not call for further discussion, since if the appeal is well taken, as of right, the whole case is properly reviewable here, (even though the Federal question has been eliminated) as has been shown by the argument on motion to dismiss.

As to whether all other questions have been foreclosed by the former decisions, depends of course upon the character of these decisions and calls for discussion of their bearing upon this case.

With reference to this question of sufficiency of description, counsel's contention is that it is entirely eliminated by the former decision of this Court (212 U. S., 152) and the State Court (44 Wash., 239), and is no longer an open question. The Court of Appeals was of the opinion, as stated in its decision, speaking of the Yordy case, (212 U. S., 152), "that that decision eliminates the question of defective description from the case before us."

In this assumption, we believe both the Court of Appeals and learned counsel for appellee are mistaken, as will be seen from a consideration of the decisions.

Although the *Yordy* case, (212 U. S. 152) involved the same tax judgment and sale that are here in litigation, and there were the defects in land description, identical with those here com-

plained of, the case went off upon the holding of this Court, that the federal question upon which its jurisdiction had been invoked, had been well decided by the State Court, whose judgment had, by writ of error, been brought up for review. That federal question was, whether if the property of the plaintiff there had been taken by the tax proceedings, it had been taken wthout due process of law because the property was nowhere so described as to charge Plaintiff with notice. No matter affecting the validity or force of the tax proceeding was of any materiality to that question, unless it was of such a character as to attest the presence or absence of due process within the meaning of the 14th amendment. The only point adjudged by the case is, that where a land owner for whose hearing in a tax proceeding due provision has been made by law, is shown to have had actual and seasonable knowledge of the particular description under which his land had been assessed and was being proceeded against, no error or legal inadequacy in such description can be said to have deprived him of his opportunity to be heard, within the meaning of the due process clause.

Proceedings for the collection of taxes have immemorially assumed so summary a character, and so endless a variety of methods and forms, both executive and judicial, that great difficulty has been experienced in finding anything in such a

proceeding, which if adopted by a state in the exercise of its discretion, can be judicially banned as not due process. About the only aid or comfort any tax payer has been able to extract from the due process clause, in its application to such proceedings, is that he cannot be denied an opportunity to be heard at some time or in some way, in opposition to an *ad valorem* tax.

Security, etc. Co. vs. City of Lexington, 203 U. S., 323;

Turpin vs. Lemon, 187 U. S., 57, 58.

The plantiff in the Yordy case, in contending that a hearing had been unconstitutionally denied, was of course obliged to concede, that in its discretion the State might, upon penalty of forfeiture, have required it to insert upon the tax rolls a description of its own land; (*King vs. Mullins*, 171 U. S., 404), or might have provided for no other notice of hearing than the fixation by statute of a time and place for it; (*Kentucky Ry. Tax Cases*, 115 U. S., 321, 332; *Pittsburg & c R. R. vs. Backus* at p. 426), or might have dispensed entirely with the judicial features of the tax proceedings; all the requisites of due process being as satisfiable by a procedure purely executive; (*Murray's Lessee vs. Hoboken Co.* 18 How. 272) that even a right to enjoin the collection of the tax by suit in Equity, constitutes a sufficient opportunity to be heard; (*McMillan vs. Anderson*, 95 U. S., 37 and 203 U.

S. 323, 333), and that no features of the Washington proceeding became essential to due process in the constitutional sense, merely because made jurisdictionally vital by the State law; since the requisites of due process are determined always by certain fundamental and universal principles of justice, and never by the direct force of a particular statute. (*Hagar vs. Reclamation District*, 111 U. S. 701, 708).

The ground upon which the plaintiff in the Yordy case nevertheless contended that the tax proceeding fell short of due process was, that the State, having in order to reap a harvest of conclusive presumptions against the property holder, elected to make a valid tax judgment a condition precedent to the divestment of title by a tax sale, the proceeding must stand or fall by those tests of due process that are applicable to judicial proceedings.

But as the trial Court had found that before the tax judgment and sale the plaintiff had actual knowledge of the description under which the tax officers were proceeding against its property, it was held by this Court that the opportunity to be heard was complete, however legally inadequate the description may have been, and instead of having been denied by law, had been voluntarily waived; that it could not be said of plaintiff, that within the constitution's meaning he had been de-

nied a right to defend, merely because he had not, with the prescribed formalities, been *required* to do so. Whether when viewed in the combined light of the Washington Statute and the general principles of law, the tax judgment and sale were vitiated by jurisdictional defects, this Court was not at liberty to decide. In the Court's opinion, however, beginning with the second sentence and continuing to the bottom of the page, the Court freely concedes the plaintiff's claim as to the legal inadequacy of the pretended description. *Ontario Land Co., vs. Yordy*, 212 U. S. at p. 156.

An analysis of the Yordy opinion, therefore, clearly shows:

1st. *That the only question which this Court deemed within its jurisdiction to determine in that case was, whether the owner under the facts of the case, was deprived of the opportunity to be heard.*

2nd. *That in view of actual knowledge of what property was intended to be taxed, the question of opportunity to be heard was not affected or controlled by rules applicable to certainty of description in tax proceedings in rem.*

3rd. *That in view of such actual knowledge, the question of insufficiency of description, became immaterial, and was involved merely as an abstract question.*

4th. *That because of the limited jurisdiction to review only the federal question as above outlined, the sufficiency of the same description in the tax notice and judgment could not be considered or decided in that case.*

5th. *That the reference by the court to the rule applicable to descriptions in general conveyancing was clearly obiter dictum, and was unnecessary to and did not control the disposition of the case.*

The Court will thus observe that the question of sufficiency of description, in so far as it affects the validity of tax summons, notice and judgment is still open in this Court and was not intended to be passed upon by this Court in the Yordy case.

As to the State decision on the sufficiency of description (44 Wash., 239), the conclusion of the Court was not arrived at by the application of any local statute or local rule of property, but by rules of construction of common law, as the Court will see from a casual reading of the opinion. Moreover, the State decision relates to so unique a combination of circumstances, that it surely cannot be regarded as embodying anything worthy to be ranked as a principle of law.

Barber vs. Pittsburg, 166 U. S., 83-100.
Lane vs. Vick, 3 How. 464-476.
Olcott vs. Supervisors, 16 Wal., 678-689.

In all the cases in this court wherein the Court felt bound to follow a particular local rule of law, it will be seen upon consideration that the particular proposition of law had in itself a certain degree of breadth or body by its applicability to combinations of circumstances of a kind already recurring or likely to recur, with some frequency, so it could take rank as a part of the law. The adjudication that by a peculiar clause in his Will, not likely to occur, a testator meant a certain thing, (as in 166 U. S., 83), is more like a finding of fact, or a matter of mixed law and fact, than the definition of a legal principle, and so an adjudication that under certain circumstances, so anomalous as never to have occurred before and never likely to occur again, a certain description is sufficient to charge with notice. In other words, the holding by the state Court that the description was sufficient for all purposes, was an *application* of law to a queer situation, but not the formulation of a rule of law.

Barber vs. Pittsburgh, 166 U. S., 83.

Again the federal Courts are not bound to follow decisions of an unsettled character, nor will they follow inconsistent decisions at the sacrifice of justice and right.

11 *Cyc.*, 902.

The standard applied by the State Court in the Yordy case by which to test in a tax proceed-

ing, the degree of certainty of a description, is certainly in conflict not only with the general law on the subject in all the States where taxes are enforced by proceedings in rem as will be shown in Part III of this Brief, but is also inconsistent with its own later decisions.

In *Miller vs. Daniels*, 92 Pac., 268, (decided in October, 1907), in a tax proceeding like ours, where the property was assessed to one "Mary M. Miller" (the actual owner), by the following description: "25 acres in Section 14, Town 20, Range 3," it was held by Washington Court that the tax proceedings were void, and description fatally defective, although it was shown in lower Court on what 25 acres the appellant Mary M. Miller, had paid the previous taxes. In the Yordy case, it is submitted, the description was much less certain, since it referred to Blocks of land which had no existence in fact and it was only by conjecture that the description could be applied to the land in question.

Again, in *Wick vs. Rea*, 103 Pac., R. 462, the State Court has expressly stated that it has been committed to the doctrine that the summons in tax proceedings must comply strictly with the statute, in order to confer jurisdiction, or the whole proceedings will be void.

The rule of strict compliance was first adapted

in *Thompson vs. Robbins*, 32 Wash., 149, and has been followed in the following cases:

Smith vs. White, 32 Wash., 416.

Dolan vs. Jones, 37 Wash., 180.

Woodham vs. Anderson, 32 Wash., 503.

Williams vs. Pittock, 35 Wash., 279.

Young vs. Droz, 38 Wash., 649.

Owen vs. Owen, 41 Wash., 644.

Bartels vs. Christenson, 46 Wash., 478.

Hays vs. Peavey, 102 Pac., 889.

Carney vs. Bigham, 99 Pac. 21.

And in *Welch vs. Beacon*, 93 Pac., 923, (decided Feb. 18, 1908), the Washington Court a year later applied a more stringent standard for testing the degree of certainty of description in the tax summons, than we can find in any other state. The property there involved was "Lot 5 in Block 7 in Syndicate Addition to Seattle," and was so described in the tax summons, but the court held it insufficient because it appeared at the trial that there were in Seattle, besides "Syndicate addition" "Kirkland Syndicate's First Addition to Seattle, and "Kirkland Second Syndicate Addition to Seattle." Just what vitiating effect this could have upon the already complete description, we don't know, but the Court held that it was jurisdiction-

ally insufficient and avoided the tax proceedings. It was there expressly laid down as a rule that the tax foreclosure proceedings is *in rem*, "and the property sought to be affected *must be described with reasonable accuracy* in the proceedings by which it is sought to charge the owner with notice."

The foregoing cases illustrate that in so far as the tax foreclosure summons or citation is concerned, the court has been committed to a stringent standard, even as to the degree of certainty of a description, and it is difficult to perceive upon what ground the State Court wholly relaxed its standard in the Yordy case only. In any event, as the ruling made in that decision is opposed to the common law on the subject, as well as being inconsistent with later decisions of the same Court, and having been applied to a very peculiar combination of circumstances, never again likely to occur, can hardly be ranked as a principle of law which this Court must follow, at the sacrifice of justice and right.

The record conclusively shows that the appellees seek to take away from us property of the value of more than $32,000.00. (Record, page 41), upon a technical tax title for which they paid $76.75, which amount, with full interest, has already been repaid by appellants and deposited in Court for their use. (Record, Pages 131, 132), pur-

suant to the tender in the bill and the decision of the Circuit Court (Record, P. 9 and 129-130), and it is no less the duty of the Court to protect the citizen against unnecessary sacrifice of property than it is to enforce payment of a tax, and in a case like this, where, as the Circuit Court remarked, an attempt is made to enforce an "unwarranted confiscation," this Court will not refuse to exert its power to prevent the same, simply because a State decision, totally out of harmony with the rules of law of the same State and of Common law, seems opposed to it.

III.

These lands were not described in the tax proceedings.

Having shown that the question of sufficiency of description is still open for determination in this case, we will now proceed to discuss the same.

The facts relative to this matter of description present the simple question whether the words "Blocks 353 and 373 of the Capitol Addition to North Yakima," can be said to describe, for the purpose of a tax sale, property which, at the time, had never been platted or divided or supposed to be platted or divided into blocks, and which had

never borne either upon any plat or upon any public record, or by the authority of the owner, or by any sort of lay or official usage, either the numbers 353, 373 or any other numbers. Can a tax officer describe the different portions of a large, entire tract, by merely subdividing it in his mind, and affixing to the different imaginary parts such numbers as for any reason he regards as appropriate, without ever condescending to make any record which might enable others to follow the flights of his imagination?

As for the implications alleged to arise from the plat's scheme of consecutive numbering, the utmost that can be claimed for them is, that they make it appear propable that *if* the "Reserved" tract had been originally sub-divided into blocks, and numbered, the numbers 353 and 373 would have been employed. How can this be material when the land was in fact neither sub-divided nor numbered? Nor does it signify that by careful study of the numbers on the plat, one might feel justified in making an ingenious conjecture as to the theory upon which the description was probably framed. What assurance could there be of the accuracy of the guess? How could a purchaser be certain whether these fictitious numbers in the tax proceedings were purposely affixed by the tax officers to previously unnumbered tracts, or whether, as would seem much more likely, they had been

used by mistake for other numbers such as 393 or 333? Suppose that it should be made to appear that while the tax officer felt justified in affixing the missing numbers to parts of the lands marked "Reserved," he did not feel bound to affix them consecutively or to blocks of the same size as those platted, and so in fact had not applied the numbers as ingenious conjecture might have led one to suppose that he would. Whose numbering would prevail; the conjectural or the official? What assurance could the tax sale purchaser or his remote grantee have, that the tax officer had applied the numbers consecutively, or that the blocks into which in his imagination, he had seen the "Reserved" tract sub-divided, were of the same size as the standard blocks of the addition? What assurance, even now, has the Court, upon these subjects since the proofs are silent respecting them?

The State Court as shown by its opinion, in the *Yordy* case, was enabled to support this alleged description only through the two assumptions, about equally unreasonable, that these numbers would have sufficiently identified the property in a private deed or contract, and that their sufficiency in a tax proceeding is determinable by the same rules as in ordinary conveyancing. The former assumption does not call for discussion, since it is not material here, unless the latter is sound, which manifestly it is not. In a tax pro-

ceeding the description of the lands has the double function of notifying the owner and the public, *i. e.*, all possible purchasers, existing encumbrancers, creditors, etc., exactly what lands are sought to be charged. Descriptive words in a conveyance, when read in the light of circumstances surrounding the parties and their transaction, may often sufficiently identify a tract as the one in fact mutually intended, (which is all that is necessary in such case) though the same words would not adequately identify the land for the purpose of legal notice to third parties, or even to the parties themselves apart from the circumstances of their particular negotiation. The former is a question determinable by the law governing the ascertainment of conventional *intent;* the latter by the law of *notice.*

Moreover in those jurisdictions where the integrity of the law as a moral rather than a drastically logical science is upheld, the standard of certainty enforced by the law of notice becomes more exacting as the hazards of oppression increase, so that in a tax proceeding which aims at the divestment of title *in invitum* in the exercise of a naked statutory power, upon constructive notice, and through the foreclosure of a lien which is always for a mere fraction of a tithe of the property value, amounting as it habitually does, practically to a species of forfeiture, a high degree of

accuracy and certainty are exacted. Of such a proceeding the Supreme Court has said:

> "The Court recognizes the correctness of the principle contended for by counsel for the plaintiff in error, that in an *ex parte* proceeding of this kind, under a special authority, great strictness is required. To divest an individual of his property, against his consent, every substantial requisite of the law must have been shown to have been complied with. * * * * It is not sufficient that a description should be given in the advertisement as would enable the person desirious of purchasing to ascertain the situation of the property by enquiry."
>
> *Ronkendorff vs. Taylor,* 4 Pet. 349, 359, 362.

(This case was cited with approval by the Washington Court in *Miller vs. Daniels,* 92 Pac. 268.)

In that case, it was therefore held in harmony with the authorities everywhere, that in a tax proceeding, the description of land as the half of a certain lot assessed to one Taylor was void for uncertainty, and could not be applied to the *undivided* one half which Taylor owned.

In a voluntary conveyance it would on the contrary, undoubtedly have been assumed that Taylor's half being undivided, it was that which he intended to convey.

Baldwin vs. Winslow, 2 Minn. 213.

So the description which in *Bird vs. Benlisa*, 142 U. S. 664, 670 was held inadequate in a tax proceeding would, in view of the facts recited on Page 668, undoubtedly have been held good in a voluntary conveyance.

So in *Stout vs. Mastin*, 139 U. S. 151, 152, where a description in a tax proceeding could easily have been sustained, if contained in a voluntary conveyance, the Court held it void.

This distinction is also involved and shown in following cases:

Tallman vs. White, 2 N. Y. 66.

Hill vs. Mowry, 6 Gray, 551, (cited approvingly in *Stout vs. Mastin*, *supra.*)

Zink vs. McManus, et al 121 N. Y. 259.

Miller vs. Williams, 135 Cal. 183, 185.

Curtis vs. The Board of Supervisors of Brown County, 22 Wis., 167.

The inadmissibility of recourse to argumentative processes or to ingenious inference in order to decipher an alleged description in a tax proceeding, is further illustrated by several decisions in Minnesota, which is one of the few states whose taxes, like those of Washington, are collected through a judicial proceeding *in rem*.

Keith vs. Hayden, 26 Minn. 212, (2 N. W. Rep. 495).

Williams vs. Central Land Co., 32 Minn. 440, (21 N. W. Rep. 550) bears strong points of resemblance to the case at bar. There, the Auditor had been expressly authorized by Statute to make and file plats describing, subdividing and numbering irregular tracts of land, by reference to which plats and numbers, said lands might be described for purposes of taxation. The ownership of a certain quarter section of land having been broken up into irregular tracts, the Auditor caused a survey to be made of it by the County Surveyor and duly filed a plat of the survey. But instead of marking the tract in controversy on the plat as Lot No. 2, it was merely stated in the certificate to the plat that the tract conveyed by Timothy Heald to Frederick Williams, (which was the tract in controversy), is called lot No. 2.

There was thus no difficulty whatever in inferring from data disclosed by public records, that the tax officers *meant* to describe the lands in controversy as lot No. 2. Yet because the number has never been attached to the lot by the owner, and because the Auditor in attempting to affix the number to the lot had not conformed to his statutory authority by affixing the number to the lot upon the face of his plat, it was held that the tract in question had never become lot No. 2 and so was not well described as such.

To appreciate how much further the case goes

than necessary to our position, it must be borne in mind, that in our case the tax officers had no authority whatever to subdivide or number unplatted tracts, and that they made no plat or other record of their subdivision or numbering, so that it is impossible to do more than conjecture that they even meant to attach any numbers to the different parts of our entire, undivided, and unnumbered "Reserved" tract.

To the same effect is 2 *Cooley on Taxation*, (3d. Ed.) p. 935. Black on Tax Titles, § 208.

To the same effect are the following cases:

Schattler vs. Cassinelli, 56 Ark., 172.
Jones vs. Pelham, 84 Ala., 208.
People vs. Mahoney, 55 Cal., 286.
Greene vs. Lunt. 58 Me., 518, 534.
Bidwell vs. Webb. 10 Minn. 59.
Jackson vs. Sloman. 117 Mich., 126.
Clemens vs. Rannells, 34 Mo., 583.
Wooters vs. Arledge, 54 Tex., 395.
Jackson vs. De Lancy, 13 Johns., 552.
Mitchell vs. Ireland. 54 Tex. 301.
Kleber Void Sales, Sec. 354, and cases cited.

It is submitted, therefore, that the reasoning of the State Court in the *Yordy* case in support of the description is certainly unsound, in so far as it assumes that the question of sufficiency of description is determinable by the rules of construc-

tion applicable to ordinary conveyancing. But the State Court's conclusions in that case are equally unwarranted from the point of view of ordinary conveyancing, assuming that such a view is material here.

Taking the plat of Capitol Addition with the tax deeds, as we must do in order to look for means of identification of the property, it becomes at once apparent, that no such blocks as those in the tax deeds appear upon the face of the plat. The natural inference is that there was an error in the description, but whether the error consists in failing to properly describe some particular property, not designating by numbers on the plat, or whether it lies in giving a wrong number of a block actually numbered on the plat, as for instance blocks 374 and 354, it is impossible to determine from the description given in the deeds. In any event it is obvious that the description is ambiguous and in the absence of other evidence of identification it is conjectural what was intended to be described.

Upon such a state of facts, on the view of ordinary conveyancing what are the applicable rules of law?

Is the Court authorized to resort to oral evidence to supply the defects in the description, or to indulge in inferences or conjectures, as to what was really *intended* to be conveyed in place of the block *actually* described?

To ascertain how far the court may go beyond the deed and plat, in aid of the concededly ambiguous description, the first inquiry is: whether the ambiguity is *patent* or *latent*, and if patent, the deed is void, and no resort to extrinsic evidence of identification is permissible.

Jones Law of Real Property and Conveyancing, Sec. 337-336.
Brown vs. Guice, 46 Miss. 299.
Jennings vs. Brizeadine, 44 Mo. 332.

That the ambiguity is patent is apparent on slight reflection. The tax deeds contain no other description or means of identification than by mere reference to Capitol Addition. There is nothing in the deeds or the plat to suggest the possibility of locating the land, or point to any source from which evidence may be sought to make the description intelligible. It is not a case, therefore, of *latent* ambiguity, since the essential elements of such ambiguity are absent here.

Jones Law of Real Property & Conveyancing, Secs. 339-344.

The ambiguity is clearly *patent on the face of the deed*, because the plat referred to in the deed is as much a part of the deed, as if it were written out upon the face of the deed itself.

Jones Law of Real Property and Conveyancing, Sec. 424.
Dolder vs. Volecki, 49 Mo. 98.
Crigin vs. Powell, 128 U. S. 691.
Hardin vs. Jordan, 140 U. S. 371-380.

Applying, therefore, to the deeds in question, the rules of ordinary conveyancing, no evidence of what was intended to be conveyed by the grantor would be admissible to support a description void on its face.

Jones on Real Property and Conveyancing, Sec. 336.

If within this rule the description cannot be aided even by extrinsic proof of what was intended to be conveyed, how much palpably unwarranted is the view permitting resort to inference or conjecture to sustain it, which is exactly what, in the last analysis, has been done by the Court in the *Yordy* case. The opinion of the Court in that case clearly shows, that ingenious *conjecture* is the sole basis by which the impossible description was applied to the property in controversy.

IV.

The lack of description is not cured by the owner's personal knowledge of the tax, whether accidentally derived, or otherwise.

As already noticed, the Washington tax proceeding is purely *in rem*.

Williams v. Pittock, 35 Wash. 271,
Woodward v. Taylor, 33 Wash. 1,

Spokane v. Abitz, 80 Pac. 192.
Carson v. Titlow, 80 Pac. 299.
Allen v. Peterson, 80 Pac. 849.
Dolan v. Jones, 79 Pac. 640.
Rowland v. Eskland, 82 Pac. 599.
And see the Washington Statutes quoted *infra*.

It is the description in the tax proceedings which constitltes the constructive seizure upon which the proceeding depends for its validity. To argue that personal knowledge of the tax, dispenses with the necessity for a description of the taxed property in the tax proceedings, is like arguing that in Admiralty no seizure is necessary if the owner of the vessel happens to learn in some other way that his craft is being libelled. As constructive notice, if regular, is effective whether resulting in actual notice or not, so if not regular it is abortive no matter how much actual knowledge there may be. In other words, in any proceeding resting upon constructive notice, the presence of actual knowledge is as utterly immaterial as its absence would be. In principle, the contention of the appellee on this point, is even exactly like arguing that in a personal action a defendant who was never summoned or cited, is bound by the judgment because he had otherwise received knowledge that the Court was assuming to proceed against him.

Neither person nor property is subject to the jurisdiction of a Court by mere knowledge on the part of the party or owner, that the court is assuming to act. And the question in hand is, it will be observed, purely a question of *jurisdiction*.

The attempt to cure the absence of seizure or of other forms of constructive notice prescribed by statute, by showing actual knowledge, is like the attempt to support, against constitutional objections, a proceeding for which no notice is prescribed by statute, by showing that notice was nevertheless actually given. In both cases the proposition is to support jurisdiction by showing *extra legal* knowledge or notice, the only difference being that the constructive notice for which actual knowledge is offered as a substitute, is in the one case prescribed by statute, in the other by the constitution. In neither case can this be done.

> "It is not enough that the owners may by chance have notice, or that they may as a matter of favor, have a hearing. The law must require notice to them and give them a right to a hearing and an opportunity to be heard."
>
> *Stuart vs. Palmer*, 74 N. Y., 188, 195.
>
> *The R. R. Tax Cases*, 13 Fed. 722, 753.
>
> *Roller vs. Holly*, 176 U. S. 398-409.

So in *Rosendorff vs. Taylor*, 4 Pet. 349, 362, where there was a failure so to describe the prop-

erty taxed as to acquaint purchasers with it, the Court said:

> "Nor, if the purchaser at the sale had been informed of every fact necessary to enable him to fix a value upon the property, yet the sale would be void, unless the same information had been communicated to the public through notice. Its defects, if any exist in the description of the property to be sold, which cannot be cured by any communication made to bidders on the day of sale by the auctioneer."

See also:

Brown vs. Denver, 7 Colo. 305.

Mayor vs. Scharf, 54 Md. 517.

State vs. Billings, 55 Minn. 467-475.

Powers v. Larrabee, 49 N. W. 724 (N. D.)

Kuntz vs. Sumption, 117 Ind. 1. (19 N. E. 474.)

V.

But aside from the question of the insufficiency of description, the appellant relied and now relies upon several defects in the tax title which it is claimed avoided the same, and which the Court below seems to have overlooked. They are as follows:

(A.) The tax deeds avoid because no notice of sale was posted or otherwise given as by law required (Par. 25 of the Bill, Page 8, Record). This fact was claimed to be established by failure to prove the posting of such notice by appellees, the burden of proof whereof being on them.

(B.) That the summons and notice as issued and published did not conform substantially to the Statute and was ineffectual to confer jurisdiction. (Page 6 of Record.)

(C.) No complaint or application for the foreclosure of tax lien was filed before publication of summons or entry of judgment, and

(D.) No certificates of delinquency have ever been filed with the Clerk of Court as required by the State Revenue Law.

The Circuit Court of Appeals, in its opinion, passed only upon the last two questions, and for some reason ignored the points as to the sufficiency of summons and tax deed by reason of defects other than the insufficiency of description. We are certainly entitled to be heard upon these propositions, and as to failure to file certificate of delinquency, the Court of Appeals came to the conclusion that the State Court held otherwise, and that its construction of the law was binding upon it, although the Circuit Court of Appeals

admitted in its opinion, that the precise question was never decided by the State Court. (Page 153, 154 of the Record). The Circuit Court made its decision Feb. 4th, 1908, in which it held that pursuant to the great weight of authority, the filing of a certificate of delinquency was the initial step in legal proceedings to foreclose a tax lien, and was jurisdictional. (Page 127-130 Record). At the time of the Circuit Court's decision, the State Court had never passed upon that precise question and the case of *Miller vs. Henderson*, 50 Wash., 200, was not decided until Aug. 6, 1908, and long after the Circuit Court had jurisdiction in this case, and had otherwise decided.

We therefore respectfully submit that the motion to affirm be likewise denied and the cause be heard upon its merits.

A. L. AGATIN,
Solicitor for Appellant.

WILLIAM W. BILLSON,
Of Counsel.

sion of which can in no way affect the rights of the property holder, does not amount to denial of due process of law.

The tax laws of the State of Washington involved in this case are clear and simple in their requirements; and the judgment of the Supreme Court of that State attacked in this suit did not deprive plaintiff in error of his property without due process of law, either because of lack of compliance with the statute or of sufficiency of notice to the owner or description of the property. *Ontario Land Co.* v. *Yordy*, 212 U. S. 152.

Where a decision is based on two grounds either of which is sufficient to sustain it, neither is *obiter*. *Union Pacific R. R. Co.* v. *Mason City R. R. Co.*, 222 U. S. 237.

171 Fed. Rep. 51, affirmed.

THE facts, which involve the validity under the Fourteenth Amendment of certain tax proceedings in the State of Washington, are stated in the opinion.

Mr. Arcadius L. Agatin, with whom *Mr. William W. Billson* was on the brief, for appellant:

Lack of adequate description renders tax titles void and the question is not foreclosed by former decisions. *The Ontario Land Co.* v. *Yordy*, 212 U. S. 152; 44 Washington, 239, does not control this case.

The question in the *Yordy Case* did not depend upon the sufficiency of description at all, and that question was not involved, except as an abstract question. In this case the question of description is vital, as a question of jurisdiction and not as a question of due process.

The Washington tax proceeding is purely *in rem*. The divestment of title through such a proceeding is manifestly impossible without a description of the property affected.

The tax summons, notice, judgment and tax deeds are absolutely void for want of description.

Jurisdictional and other defects render tax judgment and deeds null and void. The judgment is void because of failure to file application.

By § 4878, Bal. Code, under which service was at-

tempted to be made in the tax proceedings here involved, the requirement for filing the complaint before publication is jurisdictional. *Barber* v. *Morris*, 37 Minnesota, 194; *Murphy* v. *Lyons*, 19 Nebraska, 689; 28 N. W. Rep. 328; *Anderson* v. *Coburn*, 27 Wisconsin, 558; *Witt* v. *Meyer*, 69 Wisconsin, 595; 17 Ency. Pl. & Pr. 51–56; Kelber, Void Judicial Sales, § 122; 35 N. W. Rep. 25; 61 Wisconsin, 185; 99 Missouri, 638; *McManus* v. *Morgan*, 80 Pac. Rep. 786; *Klenk* v. *Byrne*, 143 Fed. Rep. 1008.

Failure to file certificate of delinquency was fatal to jurisdiction. *Barber* v. *Morris*, 37 Minnesota, 194; 33 N. W. Rep. 559; *Galpin* v. *Page*, 18 Wall. 350.

The tax judgment is void for want of jurisdiction, because the tax summons is not in conformity to law. The summons does not inform the defendants that any complaint was filed in court, or that it was filed at all. In tax foreclosure proceedings, the form of summons and its contents must conform to § 4878, Bal. Code. *Williams* v. *Pittock*, 35 Washington, 271; *Woodham* v. *Anderson*, 32 Washington, 500; *McManus* v. *Morgan*, 80 Pac. Rep. 786; *Bartels* v. *Christianson*, 90 Pac. Rep. 658.

The failure in the summons to state that the complaint has been filed is a substantial departure from the statutory requirements for a summons, and, therefore, the court acquired no jurisdiction to enter judgment and the judgment entered thereon is wholly void. Brown on Jurisdiction, § 41; Wade's Law of Notice, 2d ed., § 1030; 26 Am. & E. Ency. Law, p. 692; Sutherland on Statutory Const. 454–455; Maxwell on Interpretation of Statutes, 333–337; Blackwell on Tax Titles, 287, 288; *Odell* v. *Campbell*, 9 Oregon, 298, 305; *Lynam* v. *Milton*, 44 California, 630; *Hayes* v. *Lewis*, 21 Wisconsin, 662; *Kendell* v. *Washburn*, 14 How. Pr. 380; *Durham* v. *Betterton*, 79 Texas, 223; *Fernekes* v. *Case*, 75 Iowa, 152; *Black* v. *Clendinin*, 3 Montana, 44; *Caulkins* v. *Miller*, 55 Nebraska, 601; *Delaware* v. *Bank*, 77 S. W. Rep. 628 (Tex.); 20 Ency.

Pl. & Pr. 1115; *Cleffern* v. *Tomlinson*, 62 Minnesota, 197.

The judgment is void because the summons required answer "within 60 days after first publication" instead of "within 60 days after the date of the first publication." *Woodham* v. *Anderson*, 32 Washington, 500; *Thompson* v. *Robbins*, 32 Washington, 149; *Bailey* v. *Hood*, 80 Pac. Rep. 559; *Dolan* v. *Jones*, 79 Pac. Rep. 640; *Young* v. *Droz*, 80 Pac. Rep. 810.

The tax deeds are void because no notice of sale was posted or otherwise given as required by statute under which the deeds were executed. Bal. Code, § 1756. This requirement is mandatory, and the failure to observe it makes the sale void. *Martin* v. *Barbour*, 140 U. S. 634; *McCord* v. *Sullivan*, 80 N. W. Rep. 989; *Olson* v. *Bagley*, 37 Pac. Rep. 37; *Sweigle* v. *Gates*, 84 N. W. Rep. 481; *Blackwell* v. *First National Bank*, 63 Pac. Rep. 43; *Baumgardner* v. *Fowler*, 34 Atl. Rep. 537; *Olson* v. *Phillips*, 80 Minnesota, 339; *Rustin* v. *Merchants, &c.*, 47 Pac. Rep. 300; *Alexander* v. *Gordon*, 101 Fed. Rep. 91, 96; Black on Tax Titles, 205; 2 Cooley on Taxation, 928–930 (3d ed.).

The record in the case at bar is entirely silent as to notice of the sale being posted. This being so, the fact should be deemed established that there was no such notice, because the burden is on the tax purchaser to show that the notice was posted, and objection to their introduction in evidence on that ground should be sustained. *Williams* v. *Peyton*, 4 Wheat. 77; *Ransom* v. *Williams*, 2 Wall. 313; *State* v. *Inhabitants*, 52 Atl. Rep. 238; Black on Tax Titles, 2d ed., §§ 346, 443; 2 Cooley on Taxation, 915, 916.

The burden of proof as to notice of sale is not changed by Bal. Code, § 1767, *supra*.

This statute only makes the tax deed evidence of the proceedings at the sale; such as, that the sale was on Saturday, that it was at public auction and to the person offer-

ing to pay the amount for the least quantity of land, that it was between the hours of 9 a. m. and 4 p. m., etc. The rule of evidence provided by the statute quoted does not relate to any proceedings prior to the sale. 2 Cooley on Taxation, 3d ed., 1006; *Wilson* v. *Lemon*, 23 Indiana, 433; *Breewman* v. *Bingham*, 5 N. Y. 366; *Westbrook* v. *Willey*, 47 N. Y. 458; *Carpenter* v. *Shinners*, 41 Pac. Rep. 473 (Cal.); *Kepley* v. *Fouke*, 58 N. E. Rep. 303 (Ill.); *King* v. *Cooper*, 38 S. E. Rep. 924 (N. Car.); *Johnson* v. *Harper*, 18 So. Rep. 198 (Ala.); *Carnham* v. *Sieber*, 82 Pac. Rep. 592 (Colo.); *Pelham* v. *Beggs*, 72 Pac. Rep. 1077 (Colo.); *Ayer* v. *Dillard*, 33 So. Rep. 714 (Fla.).

Mr. Benjamin S. Grosscup, with whom *Mr. Ira P. Englehart* was on the brief, for appellees.

Mr. Justice McKenna delivered the opinion of the court.

Suit to quiet title to certain real estate situate in North Yakima, State of Washington, against certain tax deeds issued to appellees by the county treasurer of Yakima County.

It was brought in the Circuit Court for the Eastern District of Washington, Southern Division. A decree was entered in favor of appellant. 162 Fed. Rep. 999. It was reversed by the Circuit Court of Appeals. 171 Fed. Rep. 51.

The case depends upon the sufficiency of the tax deeds which appellant assails in its bill, after averments of diversity of citizenship, alleging the following: The land is part of Capitol Addition to North Yakima and is designated on a plat thereof as "Reserved." It appears from the plat which is attached to the bill that the tract is surrounded by blocks, the lines of which and of the streets, if extended over the tract, would constitute it

blocks 352, 372, 353 and 373. The "Reserved" was platted as Herman's Addition and a plat duly recorded in the office of the county recorder of Yakima County on the eighth of December, 1904, and since the execution and recording of the plat the "Reserved" has not been otherwise known or designated than by lots and blocks, according to the recorded plat. Before the recording of the plat the "Reserved" tract was not known or designated by any other than that name, and as a matter of fact there were not upon the map blocks or lots designated as blocks 352, 372, 353 and 373, nor any block or parcel of land to which such description could be made to apply, and, it is averred that, therefore, the description in the tax proceedings were utterly void on its face for the reason that it does not describe any land.

In 1901 Yakima County commenced proceedings in the Superior Court of Yakima County, the county being plaintiff and Edward Whitson and a large number of other persons were named as defendants, which included, among other lands, blocks 352, 353, 372 and 373, Capitol Addition to North Yakima. The proceedings purported to be under the laws of Washington for the foreclosure of tax liens and culminated in a judgment and tax deeds. A pretended summons and notice were issued and published, but neither appellant nor any person was ever made or named a party defendant in the proceedings, either in the application for judgment or in the tax summons or notice as filed or published nor in the tax judgment, and the owners of the blocks were designated as "unknown." The judgment was entered by default, and neither appellant nor any other person ever appeared or answered in the proceeding.

Appellees' claim of title rests exclusively on the tax judgment and deeds and is based upon a certain decision of the Supreme Court of the State in a case in which appellant was plaintiff and one Jay Yordy et al. were

defendants, which case involved lands within the tract designated "Reserved" herein, the decision of which was based "upon pretended principles of law which the court in that case applied in palpable violation of the provisions of the Fourteenth Amendment of the Constitution of the United States."

It is alleged that by the 'law of the land' in order to constitute a proper and legal notice under the Fourteenth Amendment it is necessary that in a tax proceeding *in rem* the description of the property sought to be sold must be so full and clear as to disclose to persons of ordinary intelligence, without resort to inferences, what property is thus intended to be taken. It is further alleged that the notice in the tax proceedings had not that sufficiency and that, hence, to hold the judgment and deeds valid would deprive appellant of its property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States. The protection of the Amendment is claimed "and that because of the aforesaid unconstitutional decision of the State Supreme Court, the principles of which, if applied here, may deprive your orator of its property in violation of the said Fourteenth Amendment, your orator invokes the protection of said article in this case, and hereby claims protection thereunder against the pretended claims of said defendants" (appellees).

There are other allegations, to the following effect: The judgment and tax deeds are void, because the court was without jurisdiction of the proceedings because the notice of summons does not contain the specification of process, notice or summons as required by the laws of Washington, either in form or substance; that the summons was never served except by a pretended publication, and that neither it nor the application for judgment or complaint for the foreclosure of the tax liens was ever filed in the office of the clerk of the Superior Court; that

no certificate of delinquency upon which the proceedings were based was ever filed in that court as required by the laws of Washington, and that no complaint or application for judgment was ever filed in the office of the clerk of the court until the day of the entry of judgment.

That no notice of sale was ever given or posted as required by law, and that the sale by the county treasurer of block 373 for $76.77 and block 353 for $76.77 was wholly unauthorized by the judgment and in excess of his authority; that appellant is willing and has offered to pay into court the amount of taxes assessed against the property which may be found to be justly due. A copy of the decision of the State Supreme Court in the *Yordy Case* is attached to the bill.

The answer of appellees denied the allegations of the bill, and set up title under the tax proceedings and the sale and deed thereunder.

They alleged that the land, by the description of blocks, was taxed for state, county and municipal purposes for several years prior to September, 1902, and that the taxes being delinquent on said blocks, the county of Yakima filed in the office of the clerk of the county its summons, notice and petition to foreclose the tax lien of the county, the case being entitled, *Yakima County, State of Washington, Plaintiff*, v. *Edward Whitson et al., Defendants*, and duly published the same "by law made and provided." That thereafter, such proceedings being had, a judgment and decree was entered foreclosing the tax lien, the court adjudging the land subject to taxation, and that the taxes due upon it were delinquent, and directed the land to be sold.

It is alleged that the judgment was duly filed for record in the office of the clerk and recorded, and that the county treasurer gave notice of sale and sold the property, as required by law, to appellees, and executed a deed therefor to them.

It is further alleged that appellant had not paid taxes on the land for many years, knew that taxes thereon were delinquent, knew of the fact of assessment, and all the subsequent proceedings and sale, "and permitted the same to be conducted without making any objection whatsoever," and is therefore estopped to claim any interest against appellees.

A motion is made to dismiss, on the ground that the bill is based on diversity of citizenship, that the decision of the Circuit Court of Appeals decided the case on questions of state and general law, and that the only question of a Federal nature has been decided by this court adversely to appellant in *Ontario Land Co.* v. *Yordy*, 212 U. S. 152, "thereby removing from the consideration of the Circuit Court of Appeals any substantial Federal question."

The motion is denied. The bill attacks the constitutionality of the state law as applied by the Supreme Court of the State, and whether the *Yordy Case* applies runs into the merits.

It will be observed that as grounds of suit the following propositions are presented by the bill: (1) The insufficiency of the description of the land, it never having been known as lots and blocks but designated or marked on the plat of Capitol Addition as "Reserved," and always known and designated as such. (2) The court acquired no jurisdiction of the property because the notice of summons was void on its face, for the reason that it did not contain the specifications of process, notice or summons in such cases required by the laws of Washington, and did not comply with the statute either in form or substance. (3) There was no service of summons except by publication, but that prior to the publication neither the summons nor the application for judgment nor the complaint was ever filed in the office of the clerk of the Superior Court. (4) No certificate of delinquency was filed in the office of the clerk of the

court as required by the laws of Washington, and no complaint or application for judgment until the day of entry of the judgment. (5) No notice of sale under the judgment was ever given or posted as required by law, and that the sale was in excess of the authority of the county treasurer.

All these propositions but the first rest upon the contention that the laws of Washington were not complied with in the particulars mentioned. For instance, it is contended that the certificate of deliquency was not filed in the office of the clerk of the court and no complaint or application for judgment until the day of the entry of judgment. This is the most important of the contentions, and we will first dispose of it.

The laws of Washington provide that any day after taxes are delinquent the treasurer of the county shall have the right and it is his duty upon demand and payment of the taxes and interest to issue a certificate of delinquency against such property, the holder of which may at any time after the expiration of three years give notice to the owner of the property that he will apply to the Superior Court of the county in which the property is situated for a judgment foreclosing a lien against the property. The contents of the notice and the time for appearance are prescribed, and the county attorney is directed to furnish forms to the certificate-holder.

After the expiration of five years from the date of delinquency if no certificate has been issued the county treasurer is required to issue certificates of delinquency to the county and file the certificates with the clerk of the court, and the treasurer shall thereupon, with the assistance of the county prosecuting attorney, proceed to foreclose in the name of the county the tax liens embraced in such certificates, and the same proceedings shall be had as when the certificates are held by individuals.

Summons may be served and notice given exclusively

by publication in one general notice describing the property as the same is described in the tax rolls. The certificates of delinquency may be general, including all property, the proceedings to foreclose may be brought in one action, and unknown owners, described as such, and all persons owning or claiming the property are required to take notice of the proceedings and of all steps thereunder. And it is provided that the court shall examine each application for judgment for foreclosing the tax lien, hear and determine the matter in a summary manner without other pleading and pronounce judgment as the right of the case may be, for the taxes, penalties, interest and costs, "and such judgment shall be a several judgment against each tract." Ballinger's Code, §§1749 *et seq.*

The certificate of delinquency was not filed. It was issued as required by law, and a summons was published and notice given that judgment would be applied for. The application was subsequently made and judgment rendered. This is shown by the judgment roll in the tax proceedings which was introduced in evidence. The application for judgment, after the title of the court and parties, set forth the following:

"Yakima County, plaintiff in the foregoing entitled action, by Wm. B. Dudley, its treasurer and legal representative, respectfully relates as follows:

"That it is the holder of Certificate of Delinquency issued on the 31st day of January, A. D. 1898, by Yakima County, State of Washington, the same being for taxes then due and delinquent, together with penalty, interest and costs thereon, upon real property situate in said county, assessed to the defendants herein for the years and in the amount hereinafter stated.

"That no redemption of said property has been made, and there is now due plaintiff herein on said certificate of delinquency the amounts set forth below, following each description, marked 'total.'"